Supreme Court, U.S.
FILED
JAN 14 1972
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-923

JAMES CECIRE, CARMINE BRACCO, JAMES HAYES, ANGUS CAMPBELL, AL KERR and EARL SHEPARD, as Trustees of the Seafarers Vacation Plan,

Petitioners.

against

RICHARD E. STEWART, as Superintendent of Insurance of the State of New York,

Respondent.

RAYMOND McKAY, GORDON SPENCER, CHARLES LA PORTE, GERALD PINISE, ALFRED H. RIGGS, C. J. BRACCO, MICHAEL KLEBANOFF and WILLIAM H. CRIPPEN, as Trustees of the District 2, M.E.B.A. Vacation Plan,

Petitioners.

against

RICHARD E. STEWART, as Superintendent of Insurance of the State of New York,

Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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IN THE

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No.

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Petitioners,

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Respondent.

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Petitioners,

against

RICHARD E. STEWART, as Superintendent of Insurance of the State of New York,

Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioners are the employer and union trustees of two separate Vacation Plans created pursuant to collective bargaining agreements between two maritime unions and various contracted employers in their industry. Petitioners in each case pray that a writ of certiorari issue to review the judgments of the New York Court of Appeals entered in the above entitled actions pursuant to its decision rendered July 6, 1971.*

Opinions Below

The memorandum opinion of the Court of Appeals of the State of New York (App. A, *infra*, pp. 1a-2a) is reported at 29 N.Y.2d 563. The decision of said court (i) denying petitioners' motion for reargument and (ii) granting petitioners' motion to amend the remittitur (App. B, *infra*, pp. 3a-4a) is not reported.

Jurisdiction

The decision of the Court of Appeals which reversed an order of the Appellate Division, Second Department and directed summary judgment for respondent, was rendered July 6, 1971. A timely motion for reargument was made but was not denied until October 21, 1971.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

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* In this Joint Petition, numerical references in parentheses will refer to the pages of the Record on Appeal to the Court of Appeals of the State of New York in *Ceeiee, et al. v. Stewart*, which case was considered together with *McKay, et al. v. Stewart*, in all prior proceedings. Identical questions are presented in each case. Accordingly, petitioners have filed this "joint petition" pursuant to Rule 23(5) of this Court to cover both cases.

Questions Presented

The creation of labor-management negotiated trust funds was expressly authorized by Congress in §302 of the Taft-Hartley Act (29 U.S.C. §186, as amended), and all such funds are subject to federal regulation under the comprehensive scheme Congress has provided for in that statute and under what this Court has described as "the common law of [the] particular industry" *Wiley & Sons v. Livingston*, 376 U.S. 543, 550.

Joint union-management trust funds have been created by collective bargaining and exist in most multi-employer industries, notably maritime and construction. These industry-wide funds are national in the scope of their operations and provide benefits for an aggregate membership numbering in the millions.

Congress has authorized the creation of trust funds for such diverse purposes as the payment of vacation wages, the establishment of apprenticeship and other training programs, the founding of child care centers for dependents of employees, and other appropriate benefits agreed upon by union and employer.

The cases before the Court deal with an attempt by the State of New York to subject such funds to local regulation. The basic question is, may New York constitutionally do so?

Has Congress (i) in authorizing national multi-employer-union administered trust funds to be created as part of the collective bargaining progress, and (ii) in providing a statutory scheme of federal regulation for all §302 funds, occupied the field to such an extent as to foreclose state or local regulation under the principles of preemption?

May a state court, by interpreting a state statute, enlarge the state's jurisdiction to include all types of §302 labor-management trust funds, even those that are not covered by Congress's specific, limited grant of concurrent regulation in 29 U.S.C. §309(b)?

Is article III-A of the New York Insurance Law, as interpreted and applied to cover every joint labor-management trust fund to which an employer makes contributions, unconstitutionally vague and indefinite?

Constitutional and Statutory Provisions Involved

The questions presented by this petition involve the Supremacy Clause (Art. VI, Sec. 2) and Fourteenth Amendment to the Constitution of the United States, and the following federal and state statutes: 29 U.S.C. §§ 186, 309 and N.Y. Insurance Law, article III-A, §§37 *et seq.* The pertinent portions of the Constitution and the statutes are set forth in Appendix C (*infra*, pp. 5a-29a).

Statement

The Seafarers and M.E.B.A. Vacation Plans

The Seafarers and M.E.B.A. Vacation Plans are like many other vacation plans in the maritime, construction and other casual employment industries in that they were conceived and devised to solve a problem peculiar to those industries.

Ordinarily, in most other industries, employees covered by collective bargaining agreements are entitled to wages, and vacation pay under those agreements. Both are paid directly by the particular employer to its employees. Were vacation payments to be so based in casual employ-

ment industries most of the employees would be deprived of any vacation pay simply because they do not often work for sufficient periods of time for any one employer.

For example, at the conclusion of a voyage, the maritime employee may ship out on the vessel of another employer, thus failing to accumulate sufficient service time to make him eligible for vacation pay from either. Similarly, the construction worker may move from site to site, and change employers, upon completion of each job.

Recognizing this problem the employers and the various unions provided in their collective bargaining agreements for the creation of joint vacation plans, whereby vacation wages would be paid to covered employees on the basis of the total number of days worked without regard to the number of employers involved thereby. In that way the employees are safeguarded against having to qualify for vacation pay with each new employer and are able to receive vacation wages as though they had worked for a single employer.

The Seafarers and M.E.B.A. Vacation Plans do precisely this. They are designed and administered *solely* as an administrative device—a conduit—to pay out the vacation wages which the unions have secured for their members through the collective bargaining process.*

Casual employment by its nature requires the worker to follow the job, across state lines if necessary. Most vacation plans allow the employee to make application for and collect his vacation pay at the nearest union of-

* The plans do not involve insurance funding or reserves, and do not employ insurance concepts such as actuarial evaluation of risks. By their very nature, the plans can meet each and every one of their obligations at all times—even if they should all fall due immediately and at once (46, 48).

fice. In petitioners' case, to effectively administer their plans and service seamen who put in at ports throughout the land, offices are maintained and business is done in most of the maritime states in the country.

Congressional regulation of the subject vacation plans

While labor and management may have agreed upon the vacation plan as an appropriate method to resolve their industry problem, it is clear that they could not carry out their plan without the express approval of Congress because of the prohibition contained in §302 of the Taft-Hartley Act. *Local No. 2, etc. v. Paramount Plastering, Inc.*, 310 F. 2d 179 (9th Cir.) *cert. denied*, 372 U. S. 944.

Congress, in turn, conditioned its approval upon compliance with all of the specific requirements set forth in 29 U.S.C. § 186 (c)(5)(B).

To be lawful, the employers' contributions to funds such as the Seafarers and M.E.B.A. Vacation Plans must be made pursuant to terms set forth in detail in a written agreement.

The statute also provides that labor and management must be equally represented in the administration of the fund together with such neutral persons as the parties may agree upon.

The agreement creating the trust must contain a provision that in the event of a deadlock and no neutral persons empowered to break the deadlock, the parties shall agree upon an impartial umpire to decide their dispute. If the parties fail to agree within a reasonable time, either may petition the United States District Court for the district where the trust fund has its prin-

cipal office to appoint an impartial umpire to resolve the dispute.

Congress has also demanded that there be an annual audit of the trust fund with a statement of the results made available for inspection by interested persons at the principal office of the trust and other designated places.

The comprehensive regulatory scheme which the state would impose on the federally created and regulated trust funds

Section 37-l(1) of the New York Insurance Law provides that the trustees of every employee welfare fund "shall be responsible *in a fiduciary capacity* for all money, property, or other assets received, managed or disbursed by them, or under their authority, on behalf of such fund." (emphasis added).

Section 37-b requires registration of each fund and the furnishing of detailed information as to its organization, and assets. Section 37-c gives the Superintendent of Insurance the unlimited power to "examine into the affairs of any employee welfare fund as often as he deems it necessary." Section 37-h further authorizes the Superintendent to "address to the trustees of any employee welfare fund or to any of its other officers, agents or employees or to any employer or labor organization representing any employees eligible for employee benefits thereunder *any inquiry in relation to the transactions or condition of the fund or any matter connected therewith.*"

In sharp contrast to the corresponding federal statute [29 U.S.C. § 186(c)(3)],* the New York law contains an

* Congress has expressly exempted from the list of proscribed payments from an employer or an employer-funded trust to a labor organization, those made "with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business" [29 U.S.C. §186(c)(3)].

absolute prohibition against any payment by an employee welfare fund to an employer or labor organization, except for services rendered or expenses incurred [§ 37-1 (2)(a)].

The Superintendent is also empowered to pass upon the fitness of the trustees and employees of such funds and to bar from employment or remove any person whose employment or retention is found "not in the best interests of the fund or adversely affects the interests of the covered employees [37-1(2)(c)].*

Finally, Section 37-1(2)(d) gives the Superintendent the discretionary power to authorize or approve any transaction otherwise prohibited by the statute—as, for example, a fund's purchase of property from an employer or labor organization [37-1(2)(a)]—upon his finding that the transaction will promote the best interests of the fund

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*In *Hill* v. *Florida*, 325 U.S. 538, this Court struck down on the ground of preemption a Florida statute which required a union's business agent to prove to the satisfaction of a Florida Board that he measures up to its standards. The Court held that such a statute circumscribed the full freedom of choice which Congress said employees should have under §7 of the National Labor Relations Act. The analogy to the cases at bar is exact. As this Court stated in *Garmon*, *supra* at p. 244:

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by §7 of the National Labor Relations Act . . . due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law."

The New York statute empowering the Superintendent to review *and remove* trustees is squarely in conflict with §7 of the National Labor Relations Act.

and not adversely affect the interests of the covered employees.

A violation of any provision of the statute or regulation promulgated thereunder is a crime—punishable as a misdemeanor [§37-1(7)].

Having in mind the Court of Appeals' expanded definition of "employee welfare fund"—"a fund established directly by employer contributions to trustees" to provide any form of benefits (29 N.Y.2d 563)—it is clear that the State has given to the Superintendent of Insurance unlimited visitorial power over every labor-management trust fund, including those created as part of the collective bargaining process to solve a nationwide industry problem and specifically authorized and regulated by federal statute.

Proceedings below

By letter dated May 6, 1966, respondent advised petitioners that the Seafarers Vacation Plan is subject to the provisions of article III-A of the N. Y. Insurance Law and that petitioners continued failure to register the Plan with the Superintendent of Insurance would result in the imposition of the civil and criminal penalties and sanctions set forth in the statute (32-33).

Petitioners disagreed with respondent's interpretation of the statute and, upon the advice of counsel, did not register the Plans. Instead, they instituted the present actions in the Supreme Court, Kings County, for declaratory judgment that the Plans are not covered by article III-A of the Insurance Law and for injunctive relief to restrain the respondent from proceeding to compel petitioners to register the Vacation Plans (8-11).

The complaint set forth petitioners' contention that "The Insurance Department of the State of New York

is preempted from regulating employer-union administered pooled vacation plans by the National Labor Relations Act as amended", and that respondent's demand that they register the Plans constituted a violation of petitioners' constitutional rights (10). Respondent's answer asserted that article III A of the Insurance Law subjects the "vacation plan to regulation thereunder, and said statute is constitutional, constitutes a valid exercise of the police power of the State of New York and is not preempted by Federal Law." (35).

Special Term granted petitioners' summary judgment. It held that a fund consisting of accumulated pooled vacation wages to be paid out to covered employees for services rendered is not covered by article III A of the Insurance Law (49-51). The Appellate Division affirmed, unanimously (35 A.D.2d 556). Neither court found it necessary to reach the broader issues of preemption and constitutionality.

On further appeal, the Court of Appeals reversed (29 N.Y.2d 563) and directed summary judgment in favor of respondent. To reach this result, however, the Court had to construe the statute as embracing every union management fund established directly by employer contributions, whether or not it has anything to do with insurance.*

* The Court was apparently influenced by respondent's assertion of the need for additional regulation to protect the beneficiaries of the vacation plans from alleged irregularities claimed to have been found in connection with other funds. *Taggart v. Utah Labor Relations Board*, 353 U. S. 1, makes clear, however, that this is not a valid basis for a state to assert its jurisdiction over funds which are created pursuant to federal law [29 U.S.C. §186(c)(6)], in the absence of a delegation of power by the Congress [*e.g.*, 29 U.S.C. §309(b)].

(*Footnote continued on following page*)

The Court of Appeals "considered", but rejected, petitioners' contention that "if Article III A of the Insurance Law were to be interpreted as to require registration of the union's Vacation Plan under penalty of criminal sanctions for non-compliance, the statute would be so vague and would so interfere with the Federal government's preemption of the field as to violate their rights to due process of law under the Fourteenth Amendment" (App. B, *infra*, pp. 3a-4a).

REASONS FOR GRANTING THE WRIT

I. The decision below, which invests a state official with broad regulatory powers over federally authorized and regulated labor-management trust funds, is in direct conflict with the constitutional principles of preemption as repeatedly stated by this Court.

The applicable principles

San Diego Building Trades Council v. *Garmon*, 359 U. S. 236 has been referred to by this Court as "the watershed" in its "continuing effort to mark the extent to which the maintenance of a general federal law of labor relations combined with a centralized administrative agency to implement its provisions necessarily

(Footnote continued from preceding page)

Moreover, it is undisputed that petitioners have been adequately bonded and that no claim has been made of any delinquency on their part since the plans were set up more than twenty years ago. The Appellate Division correctly noted employees' rights to earned wages, including vacation wages, are adequately protected under the provisions of the Labor Law, and "the Insurance Law was not enacted to give New York wage earners protection in that connection."

supplants the operation of more traditional legal processes in this field" *Motor Coach Employees v. Lockridge*, 403 U. S. 274.

Accordingly, we turn first to *Garmon*, and find that the "unifying consideration" underlying all of the Court's decisions in this area has been "regard to the fact that Congress has entrusted administration of the labor policy for the Nation, to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience . . ." (359 U. S. at p. 242).

> "The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy." (*Id.*, at p. 246)

The constitutional principles of preemption were designed "to avoid conflicting regulation of conduct by various official bodies which might have some authority over the subject matter", for,

> ". . . nothing could serve more fully to defeat the congressional goals underlying the Act than to subject, without limitation, the relationships it seeks to create to the concurrent jurisdiction of state and federal courts free to apply the general local law" *Motor Coach Employees v. Lockridge*, 403 U. S. 274, 91 S. Ct. at 1918.

Once Congress has taken hold of a subject matter, as it has in authorizing the creation of labor-management trust funds as part of the collective bargaining process and in subjecting these funds to federal regulation, then state regulation must yield in every area of "potential conflict" *San Diego Building Trades Council v. Garmon*,

359 U. S. 236, 241. And in *Garner* v. *Teamsters Union*, 346 U. S. 485, 490-491, this Court wrote

> "Congress evidently determined that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward controversies.
>
> * * *
>
> "A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."

The foregoing observation has been repeated by the Court in a number of its subsequent opinions, most recently in *Motor Coach Employees* v. *Lockridge*, *supra*; and *N.L.R.B.* v. *Nash-Finch Co.*, —— U. S. ——, 92 S. Ct. 373, 377.

The vacation plans are in an area already occupied by Congress.

Focusing "on the nature of the activities which the [State of New York has] sought to regulate," *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 243, it is at once apparent that they involve an area already occupied by Congress.

Our national labor policy, as expressed by Congress, has made the general topic of wages, including vacation pay, a mandatory subject of collective bargaining [29 U.S.C. 158(a)(5)]: *Great Southern Trucking Co.* v. *N.L.R.B.*, 127 F.2d 180 (4th Cir.), *cert. denied*, 317 U.S. 652. The

vacation plans involved herein are the direct outgrowth of the collective bargaining process and represent the method chosen by labor and management to solve an industry problem. The trusts over which the State seeks to assert jurisdiction are essential to implement the parties' agreement. They exist pursuant to the express authorization of Congress [29 U.S.C. §186 (c)(6)]. Accordingly, there can be no disagreement that:

> "Federal law here created the duty upon the parties to bargain collectively; Congress has provided for a system of federal law applicable to the agreement the parties made in response to that duty . . ." *Local 24, International Brotherhood of Teamsters, etc. v. Oliver*, 358 U.S. 283, 296.

Moreover, as we have noted above, Congress conditioned its approval of the various types of §302 funds upon compliance with the detailed regulatory scheme set forth in the statute [29 U.S.C. §186 (c)(5)(B)]. It is not for the states to question Congress' method of regulation, or to supplement it in any fashion.

Since federal law operates here in an area where its authority is paramount, there is no room for state regulation.

The areas of potential conflict between state and federal regulation of §302 trust funds

The New York statute gives the Superintendent of Insurance the right to question all of a fund's activities. Under the guise of inquiring into the fitness of the trustees* or the manner in which they discharge their fiduci-

* This, itself, is an area of conflict. See *Hill* v. *Florida*, *supra*, and discussion in footnote on page 8, *supra*.

ary obligations, the Superintendent may challenge, delay or block entirely every proposed transaction.

For example, labor and management, acting through their representatives among the trustees may decide to invest in cooperative low-cost housing which will benefit some but not all of the fund's employee beneficiaries. The Superintendent could challenge the proposed investment on the ground that, in his opinion, the rate of return is allegedly too low. He could argue that, although socially desirable, the expenditure of trust funds for such a purpose would constitute a breach of the trustees' fiduciary obligation toward the remaining employees. He could seek to enjoin the expenditure, or remove and surcharge the trustees if they go ahead with it.

Similarly, labor and management may decide to set up an apprentice training program for their industry and agree on the desired qualifications for applicants. The Superintendent might take issue with such qualifications and require that the program be enlarged or restricted to coincide with his personal view of what is desirable as a condition of his approval of the expenditure of trust funds.

One further example will suffice. Congress has expressly exempted from the list of proscribed payments from an employer or an employer-funded trust to a labor organization, those made "with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business" [29 U.S.C. §186(c)(3)]. The New York statute allows no such exemption [N.Y. Ins. Law §37-1(2)(a)]. As noted, however, §37-1(2)(d) gives the Superintendent the discretionary power to authorize otherwise prohibited transactions.

This means that if trustees decide to purchase property for a project deemed to be in the best interests of the fund's beneficiaries, and a union makes such property

available at favorable terms, the prevailing market price or less, the trustees could not purchase it without securing special approval of the Superintendent. Whether permission will be granted will depend upon the Superintendent's personal view of the merits of the project.

Since the decision below, the Superintendent of Insurance has already sought to expand his jurisdiction to include such diverse activities as the Harry Lundeberg School of Seamanship, which is an apprentice and an upgrading training fund. See letter dated 9-17-71, annexed hereto as Appendix D.

The need for invoking preemption principles is made even more clear by the following: Article II-A of the New York Banking Law deals with employee welfare funds. It is practically identical in language to Article III-A of the Insurance Law, except that the regulator is the Superintendent of Banks instead of the Superintendent of Insurance. In other words, petitioners may be pulled in diametrically opposed directions with respect to a particular matter by equally compelling directives of two different state agencies, and be subject to both civil and criminal penalties if heeding one in preference to the other.*

And New York is but one of the many maritime states throughout the country in which the Seafarers and M.E. B.A. Vacation Plans must necessarily maintain offices and do business in order to effectively carry out the objectives

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* Each statute provides that upon compliance with the regulations of any other law (Insurance Law §7-k; Banking Law §70), the trustees of an employee welfare fund may apply to the particular Superintendent, Banking or Insurance, as the case may be, for a waiver of his requirements. Such waiver, however, is purely discretionary and, if granted, may be revoked "at any time."

of labor and management. If New York's assertion of jurisdiction is upheld, it is reasonable to suppose that other states having some nexus to these funds will likewise seek to subject them to local regulation.*

The doctrine of preemption is designed to prevent precisely this type of fragmentation of authority and to avoid the "diversities and conflicts likely to result from a variety of local procedures and attitudes . . ." *Garner v. Teamsters Union*, 346 U.S. 485, 490-491.

Section 309(b) of the Welfare and Pension Plans Disclosure Act [29 U.S.C. §309(b)] does not authorize state regulation of the subject vacation plans.

In the court below, the Superintendent urged that §309 of the Welfare and Pension Plans Disclosure Act specifically allows the type of state regulation here involved; that this issue was settled by *People* v. *Automobile Transporters Welfare Plan*, *supra*; and that if federal law does not cover vacation funds, then Congress has not preempted the field. There is no merit to these contentions.

The grant of concurrent jurisdiction contained in §309 is, by its terms, limited to those collectively bargained for

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* *People* v. *Automobile Transporters Welfare Fund*, 17 A.D.2d 448, 235 N.Y.S.2d 702, 704 (1st Dep't.) *aff'd*. 13 N.Y.2d 814, 242 N.Y.S.2d 345, *cert. denied*, 376 U.S. 908 indicates how little is required for a state to assert jurisdiction over a multi-state, multi-employer fund. The welfare fund involved in that case, covered 15,000 to 16,000 employees in 24 states and had its sole and principal office in Detroit, Michigan. Only 400 to 500, or 3%, of the covered employees resided in New York. Yet that slight nexus was held sufficient to sustain New York's regulation of the fund pursuant to Congress' grant of concurrent jurisdiction [29 U.S.C. §309(b)].

employee benefit plans which are required to file and be regulated under the federal Act. As to registration and regulation of such plans, the traditional pension and welfare plans first authorized by §302 of Taft-Hartley, we agree entirely that the State of New York is not pre-empted.

We point out however that Vacation Plans are not required to register, file or be regulated under the Act.* This is beyond cavil. In an official booklet published and issued by the United States Department of Labor called "Fidelity Bonding Under the Welfare and Pension Plans Disclosure Act," the Department of Labor raises the following question and supplies the following *official* answer:

> "Does the Act apply to a vacation fund?
>
> "A. No. A fund which provides exclusively for paid vacations is neither a welfare benefit plan nor a pension benefit plan as defined in the Act." (p. 5)

As a consequence the State can find no solace in Section 309 (b) or, the decision in *People v. Automobile Transporters Welfare Fund, supra*, since the latter involved a health and welfare fund plainly subject to Article III-A, Insurance Law and plainly one of the funds required to register, etc. under the federal Act. As such, Section 309 (b) applied specifically, giving New York State the right of concurrent regulation.

Here, however, since Vacation Plans are not covered by the federal Act, Section 309 (b) is irrelevant.

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* This conclusion is further reinforced by examination of the various federal reporting forms and accompanying instruction sheets which enumerate the plans required to file—*omitting any mention* whatever of Vacation Plans.

Moreover, it is now clear that preemption does not "turn on whether the States purported to apply a remedy not provided for by the federal scheme" *Motor Coach Employees* v. *Lockridge*, *supra*; *Guss* v. *Utah Labor Relations Board*, *supra*.

The test is whether the subject is one that requires national uniformity of regulation; if so, then state power is preempted even though Congress has not affirmatively exercised the full extent of its power *e.g.*, *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 381-382. For as this Court noted in *Garmon*, "to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy" 359 U.S. at 246.

This Court has consistently adhered to Mr. Justice Holmes' admonition in *Charleston & Western Carolina Ry. Co.* v. *Varnville Furniture Co.*, 237 U.S. 597, 604:

> "When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go."

In *Missouri Pacific R. Co.* v. *Porter*, 273 U.S. 341, 345-346, the Court held:

> "Congress must be deemed to have determined that the rule laid down and the means provided to enforce it are sufficient and that no other regulation is necessary. Its powers to regulate such commerce . . . is supreme; and as that power has been exerted, state laws have no application. They cannot be applied in coincidence with, as complimentary to, or as in opposition to, federal enactments which

> disclose the intention of Congress to enter a field of regulation that is within its jurisdiction."

More recently, in *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1, 9-11, these principles were restated as follows:

> "Congress knew full well that its labor legislation 'preempts the field that the act covers insofar as commerce within the meaning of the act is concerned' and demonstrated its ability to spell out with particularity those areas in which it desired state regulation to be operative."
>
> We believe, however, that Congress has expressed its judgment in favor of uniformity. Since Congress' power in the area of commerce among the States is plenary, its judgment must be respected whatever policy objections there may be to creation of a no-man's land. Congress is free to change the situation at will."

II. The decision below has so enlarged the scope of the statute, including its criminal penalties for non-compliance, as to render it unconstitutionally vague and indefinite.

The decision of the New York Court of Appeals has so enlarged the scope of the statute as to make it impossible for any employer who makes contributions to trustees for the benefit of his employees to know, with any degree of certainty, whether he is required to comply with the provisions of Article III-A, or subject himself to criminal prosecution upon failure to do so. Every bilateral fund, whether or not it has anything to do with insurance, is now covered.

The instant case is a classic example of a statute which by judicial interpretation has been so expanded beyond its terms as to make it unconstitutionally vague and indefinite.

In *Connally v. General Construction Co.*, 269 U.S. 385, 391, this Court stated the applicable principle as follows: as follows:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conducts on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

Prior to petitioners' appeal to the New York Court of Appeals, six justices, including an unanimous Appellate Division, applied the doctrine of *ejusdem generis* and interpreted Article III-A of the Insurance Law as not applying to the subject Vacation Plans *as a matter of law*. Accordingly, where six justices of the New York Supreme Court have disagreed with seven members of the Court of Appeals as to the correct interpretation of the statute, how can any employer or trustee do other than "necessarily guess at its meaning" and possible application, and risk criminal prosecution if he should guess wrong.

> "It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves

judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case *Giaccio v. Pennsylvania*, 382 U. S. 399, 402-403.

CONCLUSION

For the foregoing reasons, this joint petition for a writ of certiorari should be granted.

Dated: New York, N. Y.
January 13, 1972.

Respectfully submitted,

ANDREW T. McENOY, JR.
and
SCHULMAN, ABRAHAM, PERKEL & McENOY
Counsel for Petitioners.

ANDREW T. McENOY, JR.
THOMAS R. NEWMAN
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Of Counsel

APPENDIX A

Opinion of the New York Court of Appeals

29 N.Y.2d 363

Raymond McKay *et al.*, as Trustees of the District 2, M. E. B. A. Vacation Plan, Respondents, v. Richard E. Stewart, as Superintendent of Insurance of the State of New York, Appellant.

James Cleary, *et al.*, as Trustees of the Seafarers Vacation Plan, Respondents, v. Richard E. Stewart, as Superintendent of Insurance of the State of New York, Appellant.

Memorandum.

The vacation plans at issue, resulting from agreements between employers and unions, are reasonably within the scope of article III A of the Insurance Law, Consol. Laws, c. 28, requiring registration with the Superintendent of Insurance and examination and reports respecting the plans as "employees' welfare funds".

Such a fund is defined as a means of providing "employee benefits by the purchase of insurance or annuity contracts or otherwise". This plainly means a fund not established through insurance or annuity contracts as well as funds established by these means; and hence it means a fund established directly by employer contributions to trustees.

And the "benefits" could include vacations under the statutory definition. A list of some benefits is stated, e.g., "medical, surgical or hospital care" and "unemployment" protection. But the definition is expressly "not limited to" that list.

Appendix A

The underlying reason for the enactment of Article III-A (L. 1956, ch. 774) was the protection from irregularities of welfare funds by registration with, reports to and examination by the Superintendent. The proof submitted shows that irregularities have been found in other vacation fund plans by the Superintendent's examination and that it has been the uniform administration interpretation as well as the Attorney-General's opinion that such plans were within the scope of article III-A (1963 Opns. Atty. Gen. 35).

The orders restraining defendant Superintendent of Insurance in each proceeding from compelling plaintiffs' trustees to register their respective vacation funds, and pursuing remedies or sanctions against plaintiffs should be reversed and summary judgment directed for defendant without costs.

Fuld, C. J., and Burke, Scileppi, Bergan, Breitel, Jasen and Gibson, JJ., concur.

In each case: Order reversed, without costs, and summary judgment directed for defendant in a memorandum.

APPENDIX B

STATE OF NEW YORK.
IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the twenty-first day of October A. D. 1971.

Present.

HON. STANLEY H. FULD.
Chief Judge, presiding.

No. No. 624.

JAMES CECERE &ORS., as Trustees of the Seafarers Vacation Plan.

Respondents.

-vs-

RICHARD E. STEWART, as Superintendent of Insurance of the State of New York.

Appellant.

& ano. action.

(McKAY & ors. v. STEWART)

A motion for reargument or, in the alternative, to amend the remittiturs in the above causes having heretofore

Appendix B

fore been made upon the part of the respondents herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion, insofar as it seeks reargument, be and the same hereby is denied, and it is

ORDERED, that the said motion, insofar as it seeks amendment, be and the same hereby is granted, the return of the remittiturs is requested and, when returned, each will be amended by adding thereto the following:

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Plaintiffs argued that if Article III-A of the Insurance Law were to be interpreted as to require registration of the union's Vacation Plan under penalty of criminal sanctions for non-compliance, the statute would be so vague and would so interfere with the Federal government's preemption of the field as to violate their rights to due process of law under the Fourteenth Amendment. The Court of Appeals considered this argument and held that there was no violation of plaintiffs' constitutional rights.

AND the Supreme Court, Kings County, hereby is requested to direct its Clerk to return said remittiturs to this Court for amendment accordingly.

A copy

GEARON KIMMEL
Deputy Clerk

APPENDIX C

Constitutional and Statutory Provisions Involved

UNITED STATES CONSTITUTION

Article VI, Section 2:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Amendment XIV, Section 1:

> "... nor shall any State deprive any person of life, liberty or property, without due process of law; ..."

STATUTES

Title 29 U.S.C. § 186:

> "Restrictions on payments and loans to employee representatives, labor organizations, officers and employees of labor organizations, and to employees or groups or committees of employees; exceptions; penalties; jurisdiction; effective date; exception of certain trust funds
>
> (a) It shall be unlawful for any employer or association of employers or any persons who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of the normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) (1) It shall be unlawful for any person to request, demand, receive, or exact, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of

his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, that (A) such payments are held

in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and, in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or

annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; or (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, or (B) child care centers for preschool and school age dependents of employees: *Provided*, That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: *Provided further*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds.

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

(e) The district courts of the United States and the United States courts of the Territories and pos-

sessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of Title 15 and section 52 of this title, and the provisions of sections 101-115 of this title. . . ."

TITLE 29 U.S.C. §309:

"*Effect of other laws—State laws*

(a) In the case of an employee welfare or pension benefit plan providing benefits to employees employed in two or more States, no person shall be required by reason of any law of any such State to file with any State agency (other than an agency of the State in which such plan has its principal office) any information included within a description of the plan or an annual report published and filed pursuant to the provisions of this chapter if copies of such description of the plan and of such annual report are filed with the State agency, and if copies of such portion of the description of the plan and annual report, as may be required by the State agency, are distributed to participants and beneficiaries in accordance with the requirements of such State law with respect to scope of distribution. Nothing contained in this subsection shall be construed to prevent any State from obtaining such additional information relating to any such plan as it may desire, or from otherwise regulating such plan.

(b) The provisions of this chapter, except subsection (a) of this section and section 308[of this

title, and any action taken thereunder, shall not be held to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of the United States or of any State affecting the operation or administration of employee welfare or pension benefit plans, or in any manner to authorize the operation or administration of any such plan contrary to any such law."

New York Insurance Law

Article III-A—Employee Welfare Funds

Sec.

37. Declaration of policy.

37-a. Definitions.

37-b. Registration.

37-c. Examinations; authorization and requirement.

37-d. Examinations; conduct.

37-e. Examinations; publication.

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37-i. Annual reports to employers and employees.

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Sec.

37 l. Compliance and enforcement.

37 m. Injunctions.

37 n. Supplementary regulations; extensions of time.

37 o. Loans for educational purposes.

37 p. Construction.

37 q. Separability.

§ 37. Declaration of Policy

It is hereby declared to be the policy of the state that employee welfare funds are of great benefit to employees and their families and that their growth should be encouraged; that the establishment and management of such funds vitally affect the well being of millions of people and are in the public interest; and that such funds should be supervised by the state to the extent necessary to protect the rights of employees and their families without imposing burdens upon such funds which might discourage their

§ 37 a. Definitions

1. Employee welfare funds. The term "employee welfare fund", as used in this article, shall mean any trust fund or other fund established or maintained jointly by one or more employers together with one or more labor organizations, whether directly or through trustees, to provide, employee benefits, by the purchase of insurance or annuity contracts or otherwise, and to which is paid or contracted to be paid anything, other than income

from investments of such fund for the benefit of employees employed in this state, and, if the principal office of the employer is located outside of the state, for at least twenty such employees; provided, however, that such term, as used in this article, shall not include any such fund where its overall management is vested, alone or jointly with other trustees, in a corporate trustee which is subject to supervision by the superintendent of banks of this state or any other state or is a member of the federal reserve system.

2. Employee benefits. The term "employee benefits", as used in this article, shall mean one or more benefits or services for employees or their families or dependents, or for both including, but not limited to, medical, surgical or hospital care or benefits, benefits in the event of sickness, accident, disability or death, benefits in the event of unemployment, or retirement benefits.

3. Trustees. The term "trustee" as used in this article, shall mean the person or group of persons who or which is charged with or has the general power of administration over an employee welfare fund and may include a person board or committee, a board of individual trustees, a board of administration or the like; provided, however, such term shall not include a corporate trustee which is subject to supervision by the superintendent of banks of this state or any other state or is a member of the federal reserve system; nor shall such term include any insurer licensed under the laws of this state or authorized to do business herein.

Appendix C

4. Superintendent. The term "superintendent," as used in this article shall mean the superintendent of insurance.

5. Employed in this state. The term "employed in this state", as used in this article, shall mean employed at a place of business maintained by the employer in the state of New York.

6. Employer. The term "employer", as used in this article, shall mean all persons part or all of whose employees or members are covered by an employee welfare fund.

7. Person. The term "person", as used in this article, shall mean all individuals (acting alone or in representative capacities), partnerships, associations, corporations, labor unions and other entities.

8. Labor organization. The term "labor organization", as used in this article, shall mean any labor union or any organization of any kind, or any agency or employee representation committee, association, group or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work.

§ 37-a. Registration

1. The trustees of every employee welfare fund shall register such fund with the superintendent within 3 months after the effective date of this article, and the trustees of every employee welfare fund commencing to do business in this state after the

effective date of this article shall register such fund with the superintendent within three months after so commencing. Such registration shall be in such form and shall contain such information relating to the organization, operations and affairs of such fund as may be prescribed by the superintendent.

2. If it is found that the conditions which originally required registration with the superintendent of insurance have ceased to exist and that new conditions exist which would not require the registration of an employee welfare fund with either the superintendent of banks or the superintendent of insurance, then the superintendent of insurance may, on application of the trustees or on his own motion, cancel the registration of such fund.

§ 37-c. EXAMINATIONS; AUTHORIZATION AND REQUIREMENT

1. The superintendent may examine into the affairs of any employee welfare funds as often as he deems it necessary, and he shall do so at least once in every five years.

2. The trustees of every employee welfare fund shall be responsible for the maintenance of accurate records of its books and accounts in conformance with generally accepted accounting principles and with any regulations prescribed with regard thereto.

§ 37-d. EXAMINATIONS; CONDUCT.

1. Whenever, pursuant to this article, the Superintendent shall determine to examine the affairs of

any employee welfare fund he shall make an order indicating the scope of the examination and may appoint as examiners one or more competent persons not employed by the trustee of such fund or interested in such fund. A copy of such order shall, upon demand and before the examination begins, be exhibited to the trustees of the employee welfare fund whose affairs are to be examined. Any examiner authorized by the superintendent shall have convenient access at all reasonable hours to the books, records, files, assets, securities, and other documents of such employee welfare fund, including those of any affiliated or subsidiary fund thereof, which are relevant to the examination, and shall have power to administer oaths and to examine under oath the trustees of such fund and their officers, agents and employees and any other persons having custody or control of such books, records, files, assets, securities or other documents, regarding any matter relevant to the examination.

2. The examiner or examiners in charge of such examination shall make a true report of every examination made by him, verified under oath, which shall comprise only facts appearing upon the books, records or other documents of the trustees of such fund or as ascertained from the sworn testimony of its trustees or their officers, agents or employees, or other persons examined concerning its affairs, and such conclusions and recommendations as may reasonably be warranted from such facts.

3. In connection with any such examination, the superintendent may appoint one or more competent persons as appraisers with authority to appraise

any real property or any interest therein which, as security or otherwise, may constitute a part of the assets of any employee welfare fund. The report of such appraiser shall be a supplement to the report of the examiner or examiners in charge.

§ 37-a. Examinations: publication

1. All reports of examinations and investigations, including any duly authenticated copy or copies thereof in the possession of any employee welfare fund, shall be confidential communications, shall not be subject to subpoena and shall not be made public unless, in the judgment of the superintendent, the ends of justice and the public advantage will be subserved by the publication thereof, in which event he may publish a copy of any such report or any part thereof in such manner as he may deem proper.

2. In any action or proceeding against the trustees of any employee welfare fund, or against their officers, agents, or employees, such report, or any part thereof, if published by the superintendent, shall be admissible in evidence and shall be presumptive evidence of the facts stated therein.

3. The superintendent may assemble and file for public inspection such information covering forms of trust indentures in use, commission and fee schedules adopted by insurers and compensation paid to trustees of employee welfare funds and such other matters affecting the establishment and administration of such funds as, in his opinion, are in the public interest.

Appendix C

§ 37-e. Examinations; expenses.

The expenses of every examination of the affairs of any employee welfare fund, including any appraisal of real property, made pursuant to the authority conferred by any provision of this chapter, shall be borne and paid by the employee welfare fund so examined. For any such examination by the superintendent or a deputy superintendent personally, the charge made shall be only for necessary travelling expenses and other actual expenses. In all other cases the expenses of examination shall also include reimbursement for the compensation paid for the service of persons employed by the superintendent or by his authority to make such examinations or appraisal; provided, however, that (1) for funds with contributions of less than thirty thousand dollars, as reported in the annual statement filed with the superintendent for the latest fiscal year covered by the examination, the charge shall not exceed three hundred dollars, (2) for funds with contributions between thirty thousand dollars and one hundred fifty thousand dollars the charge shall not exceed one percent of such contributions, and (3) the superintendent, with the approval of the comptroller, may in his discretion for good cause shown remit or reduce such charges. All charges, including necessary travelling and other actual expenses, as audited by the comptroller and paid on his warrant in the usual manner by the comptroller to the person or persons making the examination or appraisal, shall be presented to the trustees of the employee welfare fund in the form of a copy of the itemized bill therefor as certified

and approved by the superintendent or a deputy superintendent. Upon receiving such certified copy such trustees shall pay the amount thereof to the superintendent, to be paid by him into the state treasury.

§ 6. ANNUAL STATEMENT TO SUPERINTENDENT.

The trustees of every employee welfare fund shall file in the office of the superintendent, annually within five months after the close of the fiscal year used in maintaining the records of such fund, a statement, to be known as the annual statement of such fund, executed in duplicate, subscribed by its trustee or, if there is more than one trustee, then by at least two of such trustees, and affirmed by such trustees as true under the penalties of perjury, showing its condition and affairs during such fiscal year. Such fiscal year shall not be changed without the consent of the superintendent. Such statements shall be in such form and contain such substantiation by vouchers and otherwise and such other information as the superintendent shall from time to time prescribe. The superintendent shall cause to be prepared and furnished to the trustees of every employee welfare fund required by law to report to him printed forms of the statements and schedules required by him.

§ 7-a. SPECIAL STATEMENTS TO SUPERINTENDENT.

In addition to any other statements or reports required by this article, the superintendent may also address to the trustees of any employee welfare fund or to any of its duly officers, agents or em-

ployees or to any employer or labor organization representing any employees eligible for employee benefits thereunder any inquiry in relation to the transactions or condition of the fund or any matter connected therewith. Every person so addressed shall reply in writing to such inquiry promptly and truthfully, and such reply shall be, if required by the Superintendent, subscribed and affirmed as true under the penalties of perjury by such individual or individuals as he shall designate.

§ 47-4. ANNUAL REPORTS TO EMPLOYERS AND EMPLOYEES

The trustees of every employee welfare fund shall, annually, within five months after the close of the fiscal year used in maintaining the records of such fund, file a report with the superintendent to be known as the annual report of such fund, subscribed by its trustee; or if there is more than one trustee, then by at least two of such trustees, and affirmed by such trustees as true under the penalties of perjury, showing its condition and affairs during such fiscal year. Such report shall be in such form and contain such matters as the superintendent shall from time to time prescribe. Such annual report shall be kept on file with the superintendent and at the principal office of the trustees and such report, or such portion thereof as the superintendent shall deem appropriate and relevant, shall be made available by the superintendent or by the trustees, or both, for inspection by any employer contributing to such fund, by any labor organization which is a party to an agreement establishing such fund, or by any employee cov-

ered by such fund. In addition and to such extent that he deems it to be in the public interest the superintendent may require the trustees to mail such report, or such portions thereof as the superintendent shall deem appropriate and relevant; to employees covered by the fund, to contributing employers or to any labor organization which is a party to an agreement establishing such fund, or to any or all such parties.

37-J. ANNUAL STATEMENTS BY INSURANCE COMPANIES, SERVICE PLANS AND CORPORATE TRUSTEES AND AGENTS

Any insurance company, hospital, surgical or medical service plan providing benefits under an employee welfare fund, and any corporate trustee or agent holding or administering all or any part of an employee welfare fund shall, within four months after the end of each policy or fiscal year, furnish to the trustees of the fund a statement of account setting forth such information relating to the fund as the trustees of the fund may need from it in order to comply with the requirements of this article.

37-K. REGULATION UNDER OTHER LAWS

Where the trustees of any employee welfare fund are subject to and comply with the requirements of any law of this state other than this article or the law of any other state or of the United States with respect to registration, filing, examination, statements or reports, such requirements of this

article or any of them may be waived by the superintendent with respect to any such fund or trustees to the extent that they are included in such other laws. Application for such a waiver shall be made in writing to the superintendent on such form as he may require and any waiver issued by him hereunder shall be in writing and shall be filed in his office. The superintendent may, at any time, revoke any such waiver if, in his opinion, such other laws fail to accomplish adequately the purposes of this article. The action of the superintendent pursuant to this section shall be subject to judicial review.

§ 37-12 COMPLIANCE AND ENFORCEMENT

1. The trustees of every employee welfare fund shall be responsible in a fiduciary capacity for all money, property, or other assets received, managed or disbursed by them, or under their authority, on behalf of such fund.

2. (a) No employee welfare fund and no employer or labor organization representing any employees eligible for employee benefits thereunder, and no trustee or other officer or employee of any such fund, employer or labor organization shall receive, directly or indirectly, any payment, commission, loan or other thing of value from any insurance company, insurance agent, insurance broker or any hospital, surgical, dental or medical service plan, in connection with the solicitation, sale, service or administration of a contract providing employee benefits for such fund; and no such employer, labor organization, trustee, officer or employee shall receive any payment, commission, loan,

service or any other thing of value from such fund, or which is charged against such fund or would otherwise be payable to such fund, either directly or indirectly, except that any such person may receive any employee benefits to which he is otherwise entitled, and any such trustee or other officer or employee of a fund, may receive from such fund reasonable compensation for necessary services and expenses rendered or incurred by him in connection with his official duties as such; provided, however, that nothing in this subdivision shall affect the payment of any dividend or rate credit or other adjustment due under the terms of any insurance or annuity contract.

(b) No insurance company, insurance agent or insurance broker and no hospital, surgical, dental or medical service plan, shall either directly or indirectly, pay any commission, make any loan or give any other payment or thing of value to any employee welfare fund or to any employer or labor organization representing any employees eligible for employee benefits thereunder or to any trustee or other officer or employee of any such fund, employer or labor organization, in connection with the solicitation, sale, service or administration of a contract providing employee benefits for such fund.

(c) The superintendent may, after notice and a hearing, prohibit the trustees of an employee welfare fund from employing or retaining or continuing to employ or retain any person upon finding that such employment or retention involves a conflict of interest which is not in the best interests of the fund or adversely affects the interests of

covered employees. Any such finding by the superintendent shall be subject to judicial review.

(d) The superintendent may, by regulation or order, and upon such terms and conditions as he may require, authorize or approve any transaction or transactions otherwise prohibited by this subdivision upon his finding that the transaction or transactions promote or will promote the best interests of the relevant employee welfare fund and do not or will not adversely affect the interests of the covered employees.

3. (a) No insurance company shall pay any dividend or retrospective rate credit on any coverage policy except by check payable to the affected employee welfare fund or by credit memo forwarded to such fund.

(b) No employee welfare fund shall pay any premium on a covering policy except by check payable to the insurance company directly.

4. No political contributions shall be made directly or indirectly by or from any employee welfare fund.

5. The superintendent may impose a penalty of not to exceed twenty-five hundred dollars upon any trustee or other officer, agent or employee of any employee welfare fund subject to this article or may remove such trustee, officer, agent or employee from office or employment, or both such penalty and removal, if after notice and a hearing he shall find that he has wilfully failed to comply with the requirements of this article. Any such action of the superintendent under this subdivision shall be subject to judicial review.

Appendix C

(c) In any case where, after notice and a hearing, the superintendent finds that any employee welfare fund has been depleted by reason of any wrongful or negligent act or omission of a trustee or of any other person, he may transmit a copy of his findings to the attorney general, who may bring an action in the name of the people of the state or intervene in an action brought by or on behalf of an employee for the recovery of such fund for the benefit of the employees and such other persons as may have an interest in the fund.

(a) Any person who wilfully violates or causes or induces the violation of any provision of this article or any regulation hereunder shall be guilty of a misdemeanor.

(b) Any person who makes a false statement or representation of a material fact, knowing it to be false, or who knowingly fails to disclose a material fact in any registration, examination, statement or report required under this article or the regulations thereunder shall be guilty of a misdemeanor.

(c) Any person who makes a false entry in any book, record, report or statement required by this article or any regulation thereunder to be kept by him for any employee welfare fund, with intent to injure or defraud such fund or any beneficiary thereunder, or to deceive any one authorized or entitled to examine the affairs of such fund shall be guilty of a misdemeanor.

(d) Nothing in paragraphs (b) or (c) of this subdivision shall be construed in any manner to limit the effect of paragraph (a).

Appendix C

§ 37-m. Injunctions

The superintendent may maintain and prosecute in the name of the people of the state an action against any trustee or any other person or persons subject to the provisions of this article, for the purpose of obtaining an injunction restraining such person or persons from doing any acts in violation of the provisions of this article. In such action if the court finds that a defendant is threatening or is likely to do any act or acts in violation of this article, and that such violation will cause irreparable injury to the interests of the people of this state or the beneficiaries of the employee welfare fund involved, the court may grant an injunction restraining such violation. The court may, on motion and affidavits, grant a preliminary injunction ex parte and an interlocutory injunction, upon such terms as may be just: but the people of the state shall not be required to give security before the issuance of any such injunction.

§ 37-n. Supplementary regulations; extensions of time

1. The superintendent may from time to time promulgate appropriate supplementary rules and regulations designed to carry out the express provisions and purposes of this article.

2. For good cause shown, the superintendent may grant reasonable extensions of time for doing any act required by this article.

3. (a) The trustees of any employee welfare fund which has its principal place of business without

the state, shall, within ten days after registering a fund with the superintendent, file with the secretary of state a designation, subscribed by them and affirmed as true under the penalties of perjury, irrevocably appointing the secretary of state as their agent upon whom may be served any summons, subpoena, subpoena duces tecum or other process directed to such trustees, in any action or proceeding brought under the provisions of this article arising out of or in connection with any transaction, matter or thing relating to such fund. If the trustees shall fail to make such designation in the manner and within the period above set forth, or, in the case of a fund which was registered with the superintendent on the effective date of this act, within six months after such effective date, such trustees shall be deemed to have irrevocably appointed the secretary of state as agent upon whom service of such process may be made.

(b) Service of such process shall be made by serving the secretary of state with a copy thereof and such service shall be sufficient provided that notice thereof and a copy of the process are sent within ten days thereafter by the moving party to the trustees at the office address of the fund by registered mail with return receipt requested. In any examination or hearing instituted by the superintendent, service of such process shall be complete ten days after the receipt by the superintendent of a return receipt purporting to be signed by the trustees or their agent or agents in accordance with the rules and customs of the post office department, or, if acceptance was refused by the trustees or

their agents, the original envelope bearing a notation by the postal authorities that receipt was refused. In any action or proceeding instituted in any court in this state having jurisdiction of the subject matter, the moving party shall file with the clerk of the court in which such action or proceeding is pending, or with the judge or justice of such court, in case there be no clerk, an affidavit of compliance herewith, a copy of the process, and either the return receipt or the original envelope bearing a notation of refusal, as the case may be. Such affidavit and other papers shall be filed within thirty days after the return receipt of original envelope is received by the moving party, at which time service of process shall be complete. Service of any process made in accordance with this subdivision shall be deemed to have been made personally within the state and, in the case of a court action or proceeding, within the territorial jurisdiction of the court from which such process issued.

4. The trustees of every employee welfare fund shall preserve all its records of final entry and all reports and statements required by this article and the regulations thereunder for a period of at least six years from the date of making the same; provided, however, that preservation of photographic reproduction thereof or records in photographic form shall constitute compliance with the requirements of this section.

§ 37-*o*. Loans for educational purposes

Subject to the restrictions contained in this article, any employee welfare fund may lend money

to any employees covered by such fund or their children, who are attending or planning to attend colleges in this state or elsewhere, to assist them in meeting their expenses of higher education, where such loans are made by such employee welfare fund and guaranteed by the New York higher education assistance corporation in accordance with the provisions of article fourteen of the education law, and in such cases no further security for the repayment of such loans shall be required of the borrowers by such employee welfare fund.

§ 37-p. Construction

Nothing in this article shall be construed to relieve the trustees of any employee welfare fund from compliance with any other provision of this chapter or any other applicable laws of this state.

§ 37-q. Separability

If any provision of this article or the application of such provision to any person or circumstance shall be held invalid, the remainder of this article and the application of such provision to persons or circumstances other than those as to which it is held invalid shall not be affected thereby.

APPENDIX D

STATE OF NEW YORK
Insurance Department
WELFARE FUND BUREAU
55 John Street
New York 10038

Benjamin R. Schenck
Superintendent of
Insurance

September 17, 1971

Trustees
Harry Lundeberg
School of Seamanship
275 20th St.
Brooklyn, NY 11215

RE: Unregistered Fund:

Gentlemen:

Insurance Department records indicate that the captioned employee welfare fund has been established but has not registered with the Department. Pursuant to Article III-A of the Insurance Law, employee welfare funds that are jointly established and maintained by one or more employers together with one or more labor organizations, to provide employee benefits must register within three months after commencing to do business in this State.

We are enclosing a set of registration forms with instructions to enable you to register the captioned fund ex-

peditiously. We are also enclosing a copy of Article III-A of the Insurance Law for your information.

Very truly yours,

BENJAMIN R. SCHENCK
Superintendent of Insurance

By: JAMES J. HIGGINS
James J. Higgins
Supervising Examiner
Welfare Fund Bureau

RH:mm
Enclosures

Supreme Court, U. S.
FILED
MAY 10 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-923

JAMES CECIRE, CARMINE BRACCO, JAMES HAYES, ANGUS CAMPBELL, AL KERR and EARL SHEPARD, as Trustees of the Seafarers Vacation Plan,

Petitioners,

against

RICHARD E. STEWART, as Superintendent of Insurance of the State of New York,

Respondent.

RAYMOND McKAY, GORDON SPENCER, CHARLES LAPORTE, GERALD PINISI, ALFRED H. RIGGS, C. J. BRACCO, MICHAEL KLEBANOFF and WILLIAM H. CRIPPEN, as Trustees of the District 2, M.E.B.A. Vacation Plan,

Petitioners,

against

RICHARD E. STEWART, as Superintendent of Insurance of the State of New York,

Respondent.

RESPONDENT'S JOINT BRIEF IN OPPOSITION TO CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-923

JAMES CECIRE, CARMINE BRACCO, JAMES HAYES, ANGUS CAMPBELL, AL KERR and EARL SHEPARD, as Trustees of the Seafarers Vacation Plan,

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RICHARD E. STEWART, as Superintendent of Insurance of the State of New York,

Respondent.

RESPONDENT'S JOINT BRIEF IN OPPOSITION TO CERTIORARI

Opinions Below

In the New York courts this case is reported as follows: 59 Misc. 2d 380, 298 N.Y.S. 2d 829 (*McKay* v. *Stewart*; the *Cecire* v. *Stewart* decision in the State Supreme Court is unreported), affirmed 35 A.D. 2d 556, 313 N.Y.S. 2d 545

(McKay) and 35 A.D. 2d 548, 314 N.Y.S. 2d 329 (Cecire), both reversed at 29 N.Y. 2d 563, 272 N.E. 2d 887, reargument denied 29 N.Y. 2d 749 and remittitur amended 29 N.Y. 2d 746.

Statement of the Case

The actions challenge the validity of the Insurance Law § 37-a as interpreted to include petitioners' vacation funds within the statutory definition. The federal grounds asserted by this petition are (1) preemption by Congress and (2) unconstitutional vagueness.

The plans were established, pursuant to collective bargaining agreements, because many members of the unions normally work for several employers during the year as work demands shift and would not qualify for a vacation with any single one of them. Therefore, to allow for a yearly paid vacation, the plans require each employer to pay a percentage of its covered employees' wages to the funds which hold them in trust and in turn pays the vacation to the workers.* Benefits are earned on the basis of total work with plan employers.

The reporting and registration requirements of Article III-A of the Insurance Law of New York are of relative longstanding (L. 1956, c. 774). Indeed they predate the federal legislation of the Labor Management Reporting and Disclosure Act in this field. The New York State Legislature declared that employee-welfare funds are of great benefit to employees and their families but that the "funds should be supervised by the state to the extent necessary

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* The Record in the state courts included as exhibits the Trust Agreements, (*Cecire*, p. 28, *McKay*, p. 29). Both stated that the trusts were accepted in the State of New York and all legal issues and questions shall be construed and decided in accordance with the laws of the State. (Article VIII, Miscellaneous of both Plans, "3" in *Cecire*, "2" in *McKay*).

to protect the rights of employees and their families . . ." (Insurance Law § 37).

The long-standing policy and application of the welfare Fund Bureau of the State Department of Insurance has been to require registration and reporting of vacation plan trust funds together with other bilateral welfare funds. This was in accordance with the opinion of the State's Attorney-General (1963 Op. Atty. Gen. 35) and the overwhelming majority of said vacation trust funds had registered with the Department before the two petitioner Vacation Funds brought the instant cases.*

Petitioners, instead of registering, instituted actions for declaratory judgment in the state court, urging that the Funds were not required to register and seeking to enjoin the Department from enforcing registration.

Congress gave deep consideration to these bilateral welfare funds. Bearing in mind that such funds when created become trust and insurance funds within New York's and other state's statutes and require the application of principles of trust and insurance law and therefore become subject to state law (15 U.S.C. § 1011, the "McCarran Act"), Congress in enacting the Welfare and Pension Act of 1958 (29 U.S.C. § 300 *et seq.*), expressly provided for continued state regulation and supervision.

Congress sought thereby to invite more effective state regulation. This is also indicated by Senate Report No. 1440, April 21, 1958 (as reported in U.S. Code Congressional and Administrative News, 85 Congress, Second Session, 1958, Vol. III, p. 4153):

> "There is no desire to get the Federal Government involved in regulation of these plans but a disclosure

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* The records of the Department show that 77 such funds have registered and six such funds are known to the Department not to have registered. This includes the two funds involved in the instant litigation.

> statute which is administered in close cooperation with the States could also be of great assistance to the States in carrying out their regulatory functions."

and again in the Final Report of the Committee on Labor and Public Welfare, submitted by the subcommittee on Welfare and Pension Funds (reported in Sen. Misc. Reports on Public Bills, Vol. 11887, at p. 8):

> "Disclosure of the working of the Welfare and Pension Plans to a Federal agency is a mild remedy, reserving to the States a wide area for additional control. There is much room in fact at the State level for enactment of legislation designed to more clearly fix the responsibilities of trustees and to strengthen insurance regulations."

The Congress recognized similar problems when it passed the Labor-Management Relations Act in 1959. Thus while 29 U.S.C. § 186 continued a prohibition on payments to unions, it, in subd. (d), allowed welfare funds and vacation funds thereunder if they met certain specified conditions. The instant vacation funds in this case apparently meet those conditions so that is not an issue. At the same time Congress enacted 29 U.S.C. § 301 *et seq.* This the Welfare and Pension Plan Disclosure Act.

The Congress stated the policy of the United States to promote industrial peace and stability through the settlement of labor disputes via collective bargaining. 29 U.S.C. § 171. Congress also passed the Welfare and Pension Plans Disclosure Act to promote the employees' information thereof. 29 U.S.C. § 302.

The Court of Appeals held that the Funds were providing "benefits" which were included in the statutory definition of covered funds in Insurance Law, § 37-a. The underlying reason for the enactment of Article III-A (Insurance Law § 37 *et seq.*), was the protection of employees and their families from irregularities of these

trust funds by registration with reports to and examination by the Superintendent.

The remittiturs were amended to show that the Court of Appeals had considered and rejected arguments that its interpretation made the statute vague and that the Congress had preempted the field. [The lower court opinions had held that the statutory language's coverage did not embrace these vacation trust funds, and, therefore, did not reach any constitutional question.]

Reasons for Denying Certiorari

A. No substantial question of federal preemption exists, especially where Congress has invited state action.

The claim of federal preemption was discussed in *People* v. *Automobile Transporters Welfare Fund*, 17 A.D. 2d 448, 451-453, 235 N.Y.S. 2d 702 (1st Dept. 1962), *aff'd*, 13 N.Y. 2d 814, 192 N.E. 2d 222, 242 N.Y.S. 2d 345 (1963), *cert. den.* 376 U.S. 908, where the Appellate Division discussed the congressional history of the statute which demonstrated the intent of Congress to insure that the regulation of these funds should not be interfered with and cited *inter alia*, *DeVeau* v. *Braisted*, 363 U.S. 144, 80 S. Ct. 1146 (1960) and *Matter of Thacher* (*United Construction Workers*), 10 N.Y. 2d 439, 180 N.E. 2d 245, 224 N.Y.S. 2d 657 (1962). The State provisions have no effect on the collective bargaining agreement. New York is concerned only with the welfare and protection of the beneficiaries of the trust funds already agreed upon and incorporated in the trust indenture drawn as a result of the collective bargainging (*supra*, p. 2). The State is dedicated to the purpose of insuring that all such funds are honestly administered.

The "potential conflict" (Pet. joint brief, p. 14) is a mirage. It has not occurred in the more than fifteen years since the state's statute requiring registration was enacted

in 1956 and ten years since the *Automobile Transporters'* case (*supra*) and, as we have said, only petitioners and four others have failed to register these trust funds. The fact that the state law (Insurance Law Article III-A) imposes more stringent requirements than the qualifying exception to 28 U.S.C. § 186 does not create such conflict (*supra*, p. 4). As we have pointed out the Senate Committee on Labor and Public Welfare called the federal requirements "mild" and stated that it left "much room in fact" for more stringent possible preemption or conflict. *Swift & Co.* v. *Wickham*, 230 F. Supp. 398, 406 (S.D.N.Y. 1964), *aff'd*. 364 F. 2d 241 (2d Cir. 1966) *cert. den.* 385 U.S. 1036; *Florida Lime & Avocado Growers* v. *Paul*, 373 U.S. 132, 143, 83 S. Ct. 1210 (1963); *Palladio, Inc.* v. *Diamond*, 321 F. Supp. 630, 635 (S.D.N.Y. 1970), *aff'd*. 440 F. 2d 1319 (2nd. Cir. 1971), *cert. den.* —— U.S. ——, 40 U.S.L.W. 3263. *Fitzgerald* v. *Catherwood*, 388 F. 2d 400, 405-406 (2d Cir. 1968), *cert. den.* 391 U.S. 934.

In view of the fact that Congress went as far as it could to permit the states to exercise its traditional supervision and regulation of these trust funds, the contention that the federal statute (29 U.S.C. § 309) does not include the vacation trust funds and that therefore, the state statute may not be read to include such funds, is obviously not maintainable. Congress left it to the states to apply its traditional trust regulation albeit with more comprehensive requirements. Petitioners' vacation plans are organized and function in exactly the same manner as other employees' welfare funds subject to § 309 or Article III-A of New York's Insurance Law. Certainly when a court was asked to differentiate it saw "no good reason" for so doing. *Matter of Feller*, 196 Misc. 18, 20-21; 82 N.Y.S. 2d 852 (Sup. Ct., N.Y. County, 1948) on enforcing arbitration agreements.

The effort of petitioners to bring in apprentice programs, School of Seamanship (Joint Petition p. 16) or any other activity of this or any other labor union is belatedly in-

jected here. It was not presented to the courts below and therefore merits no consideration. *Rosenthal* v. *New York*, 226 U.S. 260, 272, 33 S. Ct. 27 (1912); *Hedgebeth* v. *North Carolina*, 334 U.S. 806, 68 S. Ct. 1185 (1948). In any event there has been no question raised as to the inclusion of any such programs in New York's statute. The New York court has simply held that bilateral vacation trust funds like other welfare trust funds are within the statute and the trustees should register such trust funds.*

B. The statutory language is not subject to due process challenge for vagueness.

Since the statutory language in Article III-A of the Insurance Law has been consistently interpreted by the Insurance Department to include vacation trust funds, the state's Attorney General has upheld this interpretation (1963 Opin. Atty. Gen. 35) and almost all the bilateral vacation trust funds have registered and complied with the State law provision. Therefore it borders on the frivolous to raise due process questions of vagueness applicable to cases that impose some penalty on petitioners. *Connally* v. *General Construction Co.*, 269 U.S. 385, 393, 46 S. Ct. 126 (1926).

The purpose of the "void for vagueness" rule is to give such accused sufficient warning of the kind of activity which is made criminal. *Communications Ass'n* v. *Douds*, 339 U.S. 382, 413, 70 S. Ct. 674 (1950); *Williams* v. *United States*, 341 U.S. 97, 100, 71 S. Ct. 576 (1951). In criminal

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* Similarly reference to Article II-A of the New York Banking Law is pointless. This Act (Banking Law, § 61, subd. 1) covers only a fund where "over-all management of such fund vested, along or jointly with other trustees, in a corporate trustee which is subject to supervision by the Superintendent of Banks of this State or any other state or is a member of the federal reserve system"—this means where a bank manages a trust fund. Petitioners, of course, are not such a fund and are not subject to § 61 but rather only to Insurance Law § 37-a.

cases, a defendant might be charged "with knowledge of the scope of subsequent interpretation" by the courts. *Winters* v. *New York*, 333 U.S. 507, 514, 68 S. Ct. 665 (1948); *People* v. *Epton*, 19 N.Y. 2d 496, 227 N.E. 2d 829, 281 N.Y.S. 2d 9 (1967), *cert. den.* and *app. dsmd.* 390 U.S. 29 (1968). See also *United States* v. *Harriss*, 347 U.S. 612, 618, 74 S. Ct. 808 (1954).

Moreover, the actions here are for declaratory judgment, not criminal actions and thereby the petitioners have received the judicial declaration by the highest state court that they have to register as required by the state statute and have availed themselves of the opportunity afforded to review the administrator's interpretation of the statutory language instead of subjecting themselves to a "wilful" violation (Ins. Law, § 37-1[7] [a]). *Yakus* v. *United States*, 321 U.S. 414, 444, 64 S. Ct. 660 (1944).

It is obvious that there is no basis for the contention by petitioners justifying any further consideration of this criticism of the statute.

CONCLUSION

The joint petition for a writ of certiorari should be denied.

Dated: New York, New York, March 6, 1972.

Respectfully submitted,

Louis J. Lefkowitz
Attorney General of the
State of New York
Attorney for Respondent

Samuel A. Hirshowitz
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